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8 JULIA DAVIS and BOBBY )  
9 JOE DAVIS, )  
10 Plaintiffs, )  
11 v. )  
12 )  
13 UNITED STATES OF )  
14 AMERICA, JEFFREY DEAL, )  
15 and HERBERT KAUFER, )  
16 Defendants. )  
17 \_\_\_\_\_

Case No. EDCV 07-0481-VAP  
(OPx)

[Motion filed on December  
21, 2009]

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
UNITED STATES OF AMERICA'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

18 Defendant the United States of America's Motion for  
19 Partial Summary Judgment came before the Court for a  
20 hearing on January 25, 2010. After reviewing and  
21 considering all papers filed in support of, and in  
22 opposition to, the Motion, as well as the arguments  
23 advanced by counsel at the hearing, the Court GRANTS in  
24 part and DENIES in part the Motion, as set forth below.  
25  
26

## I. INTRODUCTION

27 On April 23, 2007, Plaintiffs Julia and Bobby Joe  
28 ("BJ") Davis filed this action against Defendants the

1 United States of America ("the United States" or "the  
 2 Government") and United States Immigration and Customs  
 3 Enforcement ("ICE") Agents Jeffrey Deal<sup>1</sup> ("Deal") and  
 4 Herbert Kaufer<sup>2</sup> ("Kaufer"). The action alleges a variety  
 5 of wrongful acts by government agents following a 2004  
 6 complaint of sexual harassment lodged by Julia Davis, a  
 7 United States Customs and Border Protection ("CBP")<sup>3</sup>  
 8 employee, including searches of Plaintiffs' office and  
 9 residence in 2004 and 2005, the 2005 arrest and  
 10 prosecution of Plaintiffs on federal immigration fraud  
 11 charges, and the 2006 arrest and prosecution of  
 12 Plaintiffs on state firearms charges.

13

14 The operative complaint is the Second Amended  
 15 Complaint ("SAC"), filed on July 17, 2008. It contains  
 16 eight claims, two of them brought against only Defendants  
 17 Deal and Kaufer pursuant to Bivens v. Six Unknown Named  
 18 Agents of Federal Bureau of Narcotics, 403 U.S. 388  
 19 (1971), asserting violations of Plaintiffs' rights under  
 20 the First and Fourth Amendments to the United States  
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22 <sup>1</sup> The claims against Defendant Deal were dismissed by  
 23 the Court, with prejudice, pursuant to stipulation by the  
 parties, on January 25, 2010.

24 <sup>2</sup> The claims against Defendant Kaufer were dismissed  
 25 by the Court, with prejudice, pursuant to stipulation by  
 the parties, on January 21, 2010.

26 <sup>3</sup> Both CBP and ICE are component agencies within the  
 27 United States Department of Homeland Security ("DHS").  
 Various actions at issue in this case were taken by each  
 28 of these agencies, and some others were taken by  
 officials in DHS headquarters.

1 Constitution. (SAC ¶¶ 83, 117.) The other six claims,  
2 brought only against the Government pursuant to the  
3 Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346,  
4 2671-80, are for false imprisonment, malicious  
5 prosecution, abuse of process, trespass, conversion, and  
6 intentional infliction of emotional distress. The claims  
7 for conversion and false imprisonment have been dismissed  
8 in their entirety, as has a portion of the trespass  
9 claim. (Doc. Nos. 127, 242.)

10

11 On December 21, 2009, the Government filed a motion  
12 for partial summary judgment solely on Plaintiffs'  
13 malicious prosecution and abuse of process claims. On  
14 December 28, 2009, Plaintiffs attempted to file an  
15 opposition to the Motion, but the Court ordered that  
16 filing stricken on January 5, 2010, due to various  
17 violations of Local Rules and the Court's Standing Order.  
18 (Doc. No. 258.)

19

20 On January 7, 2010, Plaintiffs filed an amended  
21 memorandum in opposition to the Motion, an "Amended  
22 Separate Statement of Genuine Issues" ("PSGI"), a  
23 Declaration of Julia Davis, and 80 supporting exhibits.<sup>4</sup>

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25 <sup>4</sup> To comply with the Court's page limits, Plaintiffs'  
26 counsel removed the 36-page section entitled "Summary of  
27 Facts" from its initial 54-page memorandum, and replaced  
28 it with the following statement: "Plaintiffs hereby  
incorporate by reference the Declaration of Julia Davis,  
which is filed concurrently herewith." Plaintiffs added  
(continued...)

1       On January 14, 2010, the Government filed a Reply and  
2 Plaintiffs filed a "Supplemental Brief in Opposition."  
3 The Government filed a Response to this Brief on January  
4 20, 2010. The propriety and merits of these filings are  
5 discussed separately below.

6

## 7           **II. EVIDENTIARY ISSUES**

8       Before resolving the merits of the Motion, the Court  
9 first must address serious problems presented by the  
10 evidence submitted and relied upon by both the Government  
11 and Plaintiffs.

12

### 13       **A. The Government's Evidence**

14       As required by the Local Rules of this Court, the  
15 Government filed a Statement of Uncontroverted Facts and  
16 Conclusions of Law in support of its Motion for Partial

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19       <sup>4</sup>(...continued)  
20 seven pages of material to their memorandum of points and  
authorities. Thus, although the Amended Opposition  
21 complies with the letter of the Court's Standing Order  
and January 5, 2010 Order striking the original  
opposition, it runs counter to the See Orantes-Hernandez  
22 v. Gonzales, 504 F. Supp. 2d 825, 850 (C.D. Cal. 2007),  
citing St. John v. McElroy, No. 95 CIV 9810 (KMW), 1996  
23 WL 49956, at \*3-\*4 (S.D.N.Y. Feb. 6, 1996) clear spirit  
of those Orders. (failure to comply with spirit of Court  
order even if in compliance with strict letter is  
evidence of lack of good faith). Nonetheless, in order  
24 to resolve this motion, and advance this case (filed  
nearly three years ago), the Court considers Plaintiffs'  
25 Amended Opposition. Any further failure to comply with  
both the letter and spirit of the Federal Rules of Civil  
Procedure, the Federal Rules of Evidence, the Local Rules  
26 of this Court, and this Court's Standing Order may result  
27 in sanctions against counsel.  
28

1 Summary Judgment. (Doc. No. 246-1 ("DSUF").) In the  
2 DSUF, the Government stated:

3 The United States incorporates the  
4 Uncontroverted Facts submitted by Co-Defendants  
5 Herbert Kaufer and Jeffery [sic] Deal [Doc. Nos.  
6 244-3 and 239-3] and exhibits, by reference to  
7 its Statement of Uncontroverted Facts and  
8 Conclusions of Law.

9 (DSUF ¶ 1 (alterations in original).) In the DSUF, the  
10 Government cites to deposition testimony lodged with the  
11 Court only in connection with Defendant Kaufer's Motion  
12 for Summary Judgment. (DSUF ¶ 3.) Plaintiffs object to  
13 this "incorporation." (PSGI ¶ 1.)

14 The Ninth Circuit has held that, when deciding a  
15 summary judgment motion, a court need not "perform a  
16 search, unassisted by counsel, through the entire record,  
17 to look for []evidence" that creates a genuine issue of  
18 material fact. Carmen v. San Francisco Unified School  
19 Dist., 237 F.3d 1026, 1030 (9th Cir. 2001). See also Orr  
20 v. Bank of Am., 285 F.3d 764, 774-75 (9th Cir. 2002)  
21 (failure to cite to page and line number of deposition  
22 testimony in Statement of Undisputed Facts warrants  
23 exclusion of evidence). But "Rule 56 may be adequately  
24 satisfied by a lawyer designating where (outside the  
25 opposition papers) the critical evidence can be found and  
26 what it says, though ordinarily the better practice would  
27 be to photocopy and attach the evidence to the opposition  
28 papers." Carmen, 237 F.3d at 1030.

1       The rule set out in Carmen applies equally to  
2 evidence submitted in support of a motion for summary  
3 judgment, and the Court need not scour the record to find  
4 support for uncontroverted facts. "Judges are not like  
5 pigs, hunting for truffles buried in briefs." Indep.  
6 Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th  
7 Cir. 2003), quoting United States v. Dunkel, 927 F.2d  
8 955, 956 (7th Cir. 1991). The Government thus cannot  
9 generally "incorporate" the Statements of Facts and  
10 exhibits filed by Deal and Kaufer *en toto*. The Court may  
11 only consider the evidence that the Government has  
12 specifically identified, *i.e.*, only the deposition  
13 testimony of Julia Davis lodged in connection with  
14 Kaufer's motion.

15

16       Even if it was not attached to the Government's  
17 motion, this testimony can be considered so long as it is  
18 a part of the record - but it is not here. Agent  
19 Kaufer's Motion for Summary Judgment was withdrawn on  
20 December 21, 2009.<sup>5</sup> "The effect of withdrawal of a  
21 motion is to leave the record as it stood prior to the  
22 filing as though the motion had never been made." 56 Am.  
23 Jur. 2d Motions, Rules, and Orders § 32. See also  
24 Caldwell-Baker Co. v. S. Ill. Railcar Co., 225 F. Supp.  
25 2d 1243, 1259 (D. Kan. 2002); Remley v. Lockheed Martin

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28       <sup>5</sup> The Government's Motion was filed later the same day.

1 Corp., No. C00-2495CRB, 2001 WL 681257, at \*2- \*3 (N.D.  
2 Cal. 2001). Hence, neither Agent Kaufer's motion nor any  
3 of the documents and exhibits filed in support of it  
4 remain a part of the record in this case. The Court thus  
5 SUSTAINS Plaintiffs' objection to the admission of the  
6 deposition transcript, as well as all references to  
7 filings and evidence submitted in connection with the  
8 now-withdrawn motions.<sup>6</sup>

9

10 **B. Plaintiffs' Evidence**

11       **1. Plaintiffs' Amended Separate Statement of Genuine  
12           Issues**

13       In its January 5, 2010 Order, the Court noted that  
14 Plaintiffs' Separate Statement of Genuine Issues violated  
15 Local Rule 56-2, in that it was not a "concise 'Statement  
16 of Genuine Issues' setting forth all material facts as to  
17 which it is contended there exists a genuine issue  
18 necessary to be litigated." (Doc. No. 258 at p. 2.) In  
19 connection with their Amended Opposition, Plaintiffs  
20 filed an Amended Separate Statement of Genuine Issues.  
21 In this filing, Plaintiffs include extensive legal  
22 arguments about their theory of the case in the guise of  
23 "responses" to the Government's undisputed facts. See,  
24 e.g., PSGI ¶ 2 (2.5 page response discussing search of  
25 Davises' residence as response to undisputed fact

26 \_\_\_\_\_  
27       <sup>6</sup> Plaintiffs' responses to Deal's and Kaufer's  
28 Statements of Undisputed Facts are thus irrelevant and  
not considered.

1 regarding mailing of correspondence to San Bernardino  
 2 County District Attorney). In doing so, Plaintiffs fail  
 3 to accomplish the purpose of an SGI: to identify clearly  
 4 what facts are in dispute.

5

## 6       **2. Julia Davis's Declaration**

7       Plaintiffs have produced a 37-page declaration from  
 8 Plaintiff Julia Davis. Much of the declaration is  
 9 inadmissible, as it includes statements as to the  
 10 feelings, intent and knowledge of other individuals and  
 11 entities,<sup>7</sup> which lack foundation, as they have no basis  
 12 in either Mrs. Davis's personal knowledge or the attached  
 13 exhibits, and statements of legal argument and legal

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16       <sup>7</sup> See, e.g., Davis Decl. ¶ 6 (stating her supervisor  
 17 was a "known sexual predator"); ¶ 20 (stating certain  
 18 findings of an EEOC Administrative Law Judge ("ALJ") are  
 19 "obviously a great embarrassment to the DHS"); ¶ 23  
 20 (stating DHS "attempted to conceal" the ALJ's ruling  
 21 "since they were not successful in attempting to  
 22 invalidate the judicial determination" and speculating  
 23 why DHS amended a report to Congress); ¶ 26 (stating that  
 24 ICE agents "were obviously concerned not with the  
 25 underlying incident, but with whether they could find  
 26 some possible misstatement"); ¶ 40 ("It is clear from the  
 27 outset of the investigation I was viewed as the suspect  
 28 and all efforts were made to protect Ms. Boutwell. . . .");  
 ¶ 49 ("the government was aware that my requests for  
 unpaid leave to care for my husband BJ were proper"); ¶  
 51 ("In exchange for Kates' cooperation in providing  
 unauthorized access to BJ Davis' and my personal  
 documents . . . , Kaufer and Deal queried BJ Davis' name  
 in law enforcement databases . . . ."); ¶ 58 ("these  
 agents were continuing their pursuit of BJ Davis and I  
 with the hope of initiating criminal matters . . . ."); ¶  
 66 (stating DHS agents "recruited civilians" to steal  
 Davis' mail and impersonate her); ¶ 69 ("Agent Deal  
 intentionally misrepresented . . . ."); ¶ 85 (noting effect  
 of "malicious prosecution" on former co-workers).

1 conclusion,<sup>8</sup> which are inappropriate in a Rule 56(e)  
 2 declaration. See Shakur v. Schriro, 514 F.3d 878, 889  
 3 (9th Cir. 2008) (rejecting affidavit submitted in  
 4 connection with summary judgment that failed to  
 5 "affirmatively show personal knowledge of specific  
 6 facts"); Silver v. Executive Car Leasing Long-Term  
 7 Disability Plan, 466 F.3d 727, 732 n. 2 (9th Cir. 2006)  
 8 (affirming exclusion of declaration which contained legal  
 9 argument under Rule 56, noting such argument is "not  
 10 appropriate for a declaration"). The Court does not  
 11 consider any such statements.

12

13 Plaintiffs also seek to introduce 80 exhibits through  
 14 Julia Davis's declaration. The proper foundation for  
 15 these exhibits "need not be established through personal  
 16 knowledge but can rest on any manner permitted by Federal  
 17 Rule of Evidence 901(b) or 902." Sec. & Exch. Comm'n v.  
 18 Phan, 500 F.3d 895, 913 (9th Cir. 2007), quoting Orr, 285

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<sup>8</sup> See, e.g., ¶ 22 ("This act alone demonstrates an ulterior motive for targeting BJ Davis and I for prosecution. The government could hardly have been more blatant in its efforts to use the filing of criminal charges to avoid the DHS's liability on my EEO complaint."); ¶ 47 ("The only possible reason for such a disclosure was to engender bias against me because of my having brought a harassment claim against the DHS."); ¶ 51 ("Such a query of [B.J. Davis's] name was completely against [DHS] guidelines and regulations"); ¶ 55 (discussing who had legal authority to release certain documents under Nevada law); ¶ 66 (opining that agents "arranged a traffic stop without probable cause"); ¶ 75 ("There was no basis for the government's prolonged search of the residence. . ."); ¶¶ 76-77 (discussing law of search and seizure).

1 F.3d at 774. Several of these exhibits are not  
2 sufficiently authenticated, lack foundation, or are  
3 otherwise inadmissible, though, and thus the Court cannot  
4 consider them.<sup>9</sup>

5

6 Exhibit 45 is a document labeled "Confidential," with  
7 no other indication as to what it is. In Davis's  
8 Declaration, she merely states that the document is a  
9 "true and correct copy of a document produced by the  
10 government in the Case No. CR 05-757-AHM and Bates  
11 Numbered 624 to 625." (Davis Decl. ¶ 130.) This  
12 statement fails to identify what the document is, and  
13 thus the exhibit lacks foundation and is inadmissible.  
14 See, e.g., Bellah v. Am. Airlines, Inc., 656 F. Supp. 2d  
15 1207, 1210 n. 4 (E.D. Cal. 2009); Calloway v. Contra  
16 Costa County Jail Corr. Officers, No. C 01-2689 SBA, 2007  
17 WL 134581, at \*12 (N.D. Cal. Jan. 16, 2007).

18

19 Exhibit 17 is an "excerpt of an OPR interview with  
20 Officer Carolina Cisneros." (Davis Decl. ¶ 102.) "A  
21 deposition or an extract therefrom is authenticated in a  
22 motion for summary judgment when it identifies the names  
23 of the deponent and the action and includes the  
24 reporter's certification that the deposition is a true

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26 <sup>9</sup> Many exhibits not addressed here also pose serious  
27 admissibility questions. However, Plaintiffs do not cite  
28 to these exhibits for any issues relevant to this motion,  
and thus the Court need not determine their  
admissibility.

1 record of the testimony of the deponent." Orr, 285 F.3d  
2 at 774, citing Fed. R. Evid. 901(b); Fed. R. Civ. P.  
3 56(e) & 30(f)(1). The excerpt provided includes none of  
4 these features, and Davis cannot authenticate this  
5 exhibit by stating merely that it is a "true and correct  
6 copy" of the transcript. See Orr, 285 F.3d at 776. Two  
7 other exhibits are similarly unauthenticated transcript  
8 excerpts. (Davis Decl., Exs. 35, 37.) All three  
9 exhibits are inadmissible, and not considered by the  
10 Court.

12       Exhibit 48, the Declaration of Attorney Peter  
13 Szabadi, which is cited for the legal conclusions as to  
14 who could give consent for a search of corporate property  
15 under Nevada law and whether Mr. Davis had an  
16 "expectation of privacy" under federal constitutional  
17 law, Davis Decl. ¶¶ 55-56, is inadmissible for these  
18 purposes. See Nationwide Transp. Fin. v. Cass Info.  
19 Sys., Inc., 523 F.3d 1051, 1058-59 (9th Cir. 2008).

### 3. Plaintiffs' Supplemental Brief

22 On January 14, 2010, Plaintiffs filed a "Supplemental  
23 Brief in Opposition to the United States Motion for  
24 Partial Summary Judgment," along with several  
25 accompanying exhibits.<sup>10</sup> The Brief concerns a July 20,

<sup>10</sup> Although within the text of this brief,  
Plaintiffs "request leave" for such a filing, the proper  
(continued...)

1 2007 report prepared by the DHS Office of Inspector  
2 General ("OIG") ("the OIG Report") at the conclusion of  
3 an investigation into many of the events at issue in this  
4 action.

5

6 Plaintiffs contend that they did not learn of the  
7 existence of the OIG Report until a deposition conducted  
8 on November 12, 2009, and they subsequently discovered  
9 that one of the Government's experts had reviewed the  
10 report in preparing his expert testimony. (Shayesteh  
11 Decl. ¶¶ 2-3.) The Government produced a copy of the OIG  
12 Report on December 22, 2009. (Id. ¶ 5.) This copy did  
13 not include most of the exhibits attached to the  
14 original, however, and a section of the Report was  
15 redacted. (Id.) On January 11, 2010, the Government  
16 produced an unredacted version of the OIG Report, which  
17 included statements made by Assistant United States  
18 Attorney John Lee to OIG investigators. (Id. at ¶ 8.)

19

20 In the Supplemental Brief, Plaintiffs ask the Court  
21 to (1) consider the unredacted version of the OIG Report  
22 in ruling on this motion and (2) compel the production of  
23 the exhibits attached to the original report.

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<sup>10</sup>(...continued)  
course would have been to file a separate ex parte  
application seeking leave to file this brief.

1       The Court has reviewed the unredacted material and  
2 finds it has no impact on the pending motion, as it only  
3 speaks to why the federal immigration fraud charges were  
4 dismissed and whether they should have been filed in the  
5 first instance. As the Court explains below, Plaintiffs'  
6 claims regarding these issues are barred as a matter of  
7 law. Moreover, the unredacted OIG Report is subject to a  
8 protective order in this case, and Plaintiffs failed to  
9 comply with the terms of that order, which requires such  
10 documents to be filed under seal. (Doc. No. 78; Pls.'  
11 Supp. Br., Ex. 4.) The Government has thus requested the  
12 Court order this and all other exhibits to Plaintiffs'  
13 Supplemental Brief be not only stricken, but deleted from  
14 the Court's electronic filing system. That request is  
15 granted in a separate minute order.

16

17       As to the exhibits that Plaintiffs would have the  
18 Court summarily order the Government to produce,  
19 Plaintiffs cite no authority or justification for such  
20 extraordinary relief, long after any and all discovery  
21 deadlines have passed. Moreover, in its response to  
22 Plaintiffs' Supplemental Brief, the Government has  
23 indicated that it has now produced the exhibits to  
24 Plaintiffs' counsel. (Lantka Decl. ¶ 11.)

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Accordingly, the Court orders Plaintiffs' Supplemental Brief and all accompanying exhibits STRICKEN.

### **III. UNCONTROVERTED FACTS**

The following facts are supported adequately by admissible evidence and are uncontroverted by admissible evidence on the record. They are "admitted to exist without controversy" for the purposes of this Motion. See Local Rule 56-3.

See Local Rule 56-3.

#### A. Julia Davis's Employment with CBP

## **1. The Sexual Harassment Complaint and Investigation**

In 2002, Julia Davis began employment as a Customs and Border Protection ("CBP") Agent, stationed at the Port of Entry in San Ysidro, California ("the Port"). (Davis Decl. ¶¶ 5-6.) Soon after beginning her employment, her supervisor, Kevin Crusilla, began to sexually harass her. (Davis Decl. ¶¶ 6-7, Ex. 1 (June 17, 2005 Order and Opinion of Equal Employment Opportunity Commission ("EEOC") Administrative Law Judge ("ALJ") ("EEOC Op.") at p. 5.)<sup>11</sup> She reported the harassment to numerous supervisors, to no avail, before escalating her complaint to the Deputy Port Director. (Davis Decl. ¶¶ 7-8, EEOC Op. at p. 7.) The Deputy Port

<sup>11</sup> The Court exercises its discretion to admit the EEOC Order and Opinion into evidence. See Amantea Cabrera v. Porter, 279 F.3d 746, 749 (9th Cir. 2002).

1 Director told Davis a full investigation would be  
2 launched by the DHS OIG. (Davis Decl. ¶ 8, EEOC Op. at  
3 p. 7.) The harassment nonetheless continued. (Id.)  
4

5 Julia Davis then obtained a Temporary Restraining  
6 Order and Preliminary Injunction from the California  
7 Superior Court ordering Crusilla not to harass her.  
8 (Davis Decl. ¶ 9; EEOC Op. at 8.)  
9

10 At some point, Julia Davis lodged a sexual harassment  
11 complaint with the DHS Office of Professional  
12 Responsibility, the office in which Agents Deal and  
13 Kaufer worked. (Davis Decl. ¶ 11.) She also filed a  
14 grievance against DHS with the EEOC. (Davis Decl. ¶ 12.)  
15 Crusilla refused to cooperate with either the OIG or  
16 EEOC, and was allowed to retire without penalty in  
17 October 2003. (Davis Decl. ¶ 13, Ex. 12, EEOC Op. at p.  
18 9.) A November 2003 ICE Office of Internal Audit  
19 investigation substantiated Davis's sexual harassment  
20 allegations, but no action was taken due to Crusilla's  
21 retirement. (Davis Decl., Ex. 12.)  
22

23 On June 25, 2005, the EEOC ALJ issued a preliminary  
24 decision finding Davis had been subjected to unlawful  
25 sexual harassment, awarded her \$145,500 in compensatory  
26 damages, and ordered the development of sexual harassment  
27  
28

1 policies and procedures and mandated sexual harassment  
2 training at the Port. (EEOC Op. at pp. 18, 21-25.)<sup>12</sup>

3           **2. Julia Davis's Reports of "Security Breaches" and**  
4           **Investigations**

5           In the summer of 2004, Julia Davis sent several  
6 letters to various supervisors and DHS officials about  
7 what she saw as threats to security at the Port.

8  
9           In June 2004, Davis sent a letter to the Port  
10 Director expressing concern over the reduction of  
11 security staff and removal of metal detectors and X-ray  
12 equipment from the Port. (Davis Decl. ¶ 24, Ex. 13.)  
13 Also in June 2004, Davis sent a letter to the DHS OIG,  
14 describing an incident where she observed an Assistant  
15 Port Director instruct a CBP Agent to falsify a person's  
16 nationality on several documents. (Davis Decl. ¶ 25, Ex.  
17

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18           <sup>12</sup> On August 18, 2005, DHS filed a motion before the  
19 EEOC ALJ requesting that the Order be held in abeyance  
20 pending the resolution of the federal immigration fraud  
charges, discussed further below, as a conviction would  
21 purportedly deprive the EEOC of jurisdiction over the  
action. (Davis Decl., Ex. 2.) The ALJ denied the motion  
22 and issued a final decision and order, which adopted his  
preliminary decision. (Davis Decl., Ex. 3.)

23           The ALJ also determined that Davis's August 2004  
24 resignation, discussed below, was involuntary. (EEOC Op.  
25 at p. 10.) In its review of related Merit Systems  
Protection Board ("MSPB") proceedings, the Court of  
26 Appeals for the Federal Circuit affirmed the MSPB's  
contrary finding, and held that "[t]he issue of  
27 involuntary resignation was not litigated before the EEOC  
and it was not necessary to resolve the sexual harassment  
claim," and thus non-binding dicta. Davis v. Dep't of  
Homeland Sec., 305 Fed. App'x 659, 661 (Fed. Cir. 2008)  
28 (per curiam).

1 14). On August 3, 2004, Agent Deal and Agent Robert  
2 Broyles interviewed Davis about this incident. (Davis  
3 Decl. ¶ 26, Ex. 15.)

4

5 On July 5, 2004, Davis sent a letter to the Federal  
6 Bureau of Investigation ("FBI") to report an "unusually  
7 high number of individuals" who had entered the United  
8 States through the Port over the July 4 holiday from  
9 "special interest countries," and noted an insufficient  
10 number of Intelligence Officers were on duty that day.  
11 (Davis Decl. ¶ 30, Ex. 20.) She stated that the Port  
12 was not "secure under the current administration." (Id.)  
13 This letter was received by a reporter for the Los  
14 Angeles Times, who confronted CBP Commissioner Robert  
15 Bonner about it at a press briefing. (Davis Decl., Ex.  
16 24 (Fasano Dep.) 109:15-22; Ex. 25 at pp. 2-4.) CBP then  
17 launched an investigation of Julia Davis to determine if  
18 any misconduct was involved when she sent the July 5,  
19 2004 letter. (Davis Decl., Ex. 27.)

20

21 **3. Julia Davis's Cellular Telephone Damage Claim  
and Investigation**

22 Also in July 2004, Julia Davis filed a tort claim for  
23 damages to her cellular telephone, alleging her  
24 supervisor, Susan Boutwell, dropped Davis's bag, which  
25 contained the phone, "aggressively and with specific  
26 intent." (Davis Decl. ¶ 36, Ex. 34.) An investigation  
27 was launched, led by Agent Deal, who was told by Agent  
28

1 Kaufer to give the investigation "priority." (Id.; Davis  
2 Decl., Ex. 9 ("Deal 2005 Dep.") 21:8-23:10.) Boutwell  
3 denied touching Davis's bag, and told the Port Director  
4 that this was "one of the many fictitious complaints that  
5 Julia Davis has invented" and was designed "to bolster  
6 her lawsuit against the [CBP]." (Davis Decl., Ex. 29.)  
7 Boutwell and Davis both were interviewed later by Agent  
8 Deal about this incident. (Davis Decl. ¶¶ 39, 41; Ex.  
9 30, p. 24; Deal 2005 Dep. 58:2-24.)<sup>13</sup>.

10

11 After completing the investigation of the claim in  
12 October 2004, Agent Kaufer wrote a report concluding that  
13 Julia Davis had "made a false allegation against her  
14 supervisor and lied under oath." (Davis Decl., Ex. 34 at  
15 ¶ 6.) Agent Kaufer stated that the videotape recording  
16 of the area at issue refuted Julia Davis's claims. (Id.  
17 at ¶ 5.)

18

19 **4. Investigation of Julia Davis's February 2004  
Leave to Care for BJ Davis**

20 In February 2004, Julia Davis took an unpaid leave of  
21 absence under the Family and Medical Leave Act (FMLA) to  
22 care for her husband, BJ Davis, while he was working  
23 directing a movie, "Forget About It," on set in Arizona.

24

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25 <sup>13</sup> In her Declaration, Julia Davis states that  
26 Boutwell changed her position after viewing videotape  
that showed her moving the bag. (Davis Decl. ¶ 38.)  
27 Neither the cited portion of the transcript of Boutwell's  
interview, nor any other portion of the excerpt of that  
interview submitted to the Court, provide support for  
28 this statement.

1 (Davis Decl. ¶ 48, Ex. 43.) BJ Davis had been diagnosed  
2 with an unidentified "potentially terminal illness."  
3 (Davis Decl. ¶ 49.) As part of their investigation of  
4 the tort claim, Agents Deal and Kaufer also investigated  
5 this leave based on information that Julia Davis had  
6 actually been working on the movie with BJ Davis. (Deal  
7 2005 Dep. 59:4-60:15.) Julia Davis maintains she was not  
8 working on the movie. (Davis Decl. ¶ 49.)  
9

10 Among the interviews conducted as part of the agents'  
11 investigation were several meetings with Kimberly Kates,  
12 interim President of Beverly Hills Film Studios, Inc.  
13 ("BHFS"). (Davis Decl., Ex. 44 ("Kates Decl.") ¶¶ 2-17.)  
14 BJ Davis previously had served as President of BHFS until  
15 a dispute which was the subject of civil litigation  
16 between BJ Davis, BHFS, Kates, and other persons. See  
17 Davis Decl., Ex. 50 (Complaint, BJ Davis v. Beverly Hills  
18 Film Studios, Inc., et al., Los Angeles Super. Ct. No. BC  
19 323455, Oct. 25, 2004). This lawsuit was pending at the  
20 time Kates was approached by Agents Kaufer and Deal; it  
21 later was settled. (Kates Decl. ¶¶ 13, 19.) When Agent  
22 Kaufer initially contacted Kates, he said he needed to  
23 discuss BHFS's "defamatory" use of a DHS logo, and told  
24 her the FBI in Arizona was investigating her and her  
25 company, and BJ Davis had instigated the investigation.  
26 (Kates Decl. ¶ 2, Supp. ¶ 1.) Kates ultimately spoke  
27 with Agent Kaufer more than 15 times, and Agent Deal six  
28

1 or seven times. (Kates Decl. ¶ 2.) In the course of  
2 these conversations, Agent Kaufer told Kates that DHS had  
3 performed a "full search" on BJ Davis and discovered he  
4 had been convicted of murder and had a "violent past."  
5 (Kates Decl. ¶ 4.) At one point, he allowed Kates to  
6 "glance at the file with BJ's criminal charge of  
7 Murder/Theft." (Id.)

8

9 Agent Kaufer also asked Kates about Julia Davis's  
10 involvement in the production of "Forget About It" and  
11 about BJ Davis's health at that time. (Kates Decl. ¶¶ 5-  
12 6, 9-10.) Kates told him that Julia Davis had only  
13 worked on the film as a writer, and that, although she  
14 did not know details, BJ Davis "seemed genuinely sick."  
15 (Id.)

16

17 Agent Kaufer also told Kates that the Agents were  
18 investigating "any criminal activity by Julia Davis," and  
19 wanted to know if Kates thought Julia Davis was "faking"  
20 her sexual harassment claim. (Kates Decl. ¶ 7.) Kates  
21 responded she had no reason to believe Julia was making  
22 up the sexual harassment allegations. (Id. ¶¶ 7, 14.)

23

24 Kates told Agents Kaufer and Deal that BJ Davis had  
25 told her that her "actions would lead to [her] demise,"  
26 and that she had been told by a coworker that BJ had  
27 threatened to kill another coworker. (Kates Decl. ¶ 3,  
28

1 Supp. ¶ 3.) Agent Kaufer urged Kates to file criminal  
2 charges against BJ Davis and seek a temporary restraining  
3 order based on these threats, but she chose not to, as  
4 she "didn't take the threats that seriously." (Kates  
5 Decl. ¶ 3, Supp. ¶ 2.)  
6

7 **5. The Results of the Investigations**

8 On August 20, 2004, Associate Special Agent in Charge  
9 of the OPR, James Wong ("Wong"), sent a letter to Joyce  
10 Henderson, CBP San Diego Field Office Acting Director,  
11 Field Operations. (Davis Decl., Ex. 40.) In that  
12 letter, Agent Wong stated:

13 We have found evidence, which would lead a  
14 reasonable person to substantiate numerous  
15 charges of falsification against CBPI Davis to  
16 include: knowingly making false allegations  
against agency personnel, making false  
statements under oath and filing a fraudulent  
tort claim.

17 (Id.) Citing security concerns, Agent Wong recommended  
18 Julia Davis be placed on administrative leave pending  
19 review by the CBP Disciplinary Review Board. (Id.)  
20 Later that same day, Henderson acted upon this  
21 recommendation and placed Julia Davis on administrative  
22 leave. (Davis Decl., Ex. 41.) Davis tendered her  
23 resignation the same day, as a result of what she  
24 identifies as "blatant retaliation" for her EEOC claim  
25 and letters about security concerns.<sup>14</sup> (Davis Decl. ¶¶

---

27 <sup>14</sup> Julia Davis later appealed to the MSPB in an  
attempt to get her job back. (Davis Decl., Exs. 25, 42,  
28 (continued...))

1 57, 60.) Three weeks later, a determination was made  
2 that Julia Davis's FMLA leave request was fraudulent.  
3 (Davis Decl., Ex. 43.)  
4

5 **B. The Federal Criminal Action**

6 **1. The Investigation and Filing of Charges**

7 In January 2005, Agent Deal began an investigation  
8 into potential marriage fraud by the Davises, based on  
9 information received from the CBP Office of General  
10 Counsel that Julia Davis married BJ Davis in February  
11 1995, emigrated to the United States in June 1995, and  
12 became a naturalized United States citizen in October  
13 1999. (OIG Report at p. 2.) After completing his  
14 investigation, Agent Deal concluded that Julia Davis had  
15 "paid BJ Davis \$10,000 to marry her and then filed a  
16 petition that allowed her to immigrate to the United  
17 States." (Id.)<sup>15</sup>

18  
19 Based on the results of this investigation, the  
20 United States Attorney's Office for the Central District  
21 of California sought to indict Julia Davis on charges of  
22

---

23 <sup>14</sup>(...continued)  
24 65.) This appeal was decided in favor of DHS in a  
25 decision affirmed by the Court of Appeals for the Federal  
Circuit on December 18, 2008. Davis v. Dep't of Homeland  
Sec., 305 Fed App'x 659 (Fed. Cir. 2008) (per curiam).

26 <sup>15</sup> While Plaintiffs have produced evidence which  
27 calls the accuracy of this conclusion into dispute, Davis  
Decl. ¶ 2, they have not produced any evidence  
28 controverting the fact that Deal so concluded at the  
time.

1 conspiracy, 18 U.S.C. § 371; unlawful procurement of  
2 citizenship, 18 U.S.C. § 1425(b); and aiding and abetting  
3 unlawful procurement of citizenship, 18 U.S.C. §§ 2(a),  
4 1425(b); and to indict BJ Davis on conspiracy and  
5 unlawful procurement of citizenship charges alone. (OIG  
6 Report at p. 2.)

7

8 On August 9, 2005, Julia and BJ Davis were indicted  
9 on each of the charges by a grand jury in this District,  
10 and arrest warrants were issued. (Davis Decl., Ex. 31  
11 ("ICE Report") at p. 1.)

12

13 **2. The Execution of the Arrest Warrants**

14 Agent Deal and other ICE OPR Agents conducted  
15 surveillance of the Davises' home in Yucca Valley for a  
16 week before their grand jury indictment. (ICE Report at  
17 p. 2; Davis Decl., Ex. 54 ("SRT Report") at p. 1.)  
18 During that week, Agents Deal and Kaufer contacted the  
19 ICE Special Response Team ("SRT"), seeking to use the SRT  
20 to affect the arrests of the Davises, citing BJ Davis's  
21 status as someone who had been "convicted of first-degree  
22 murder" and Julia Davis's "former status as a federal  
23 officer." (ICE Report at p. 2.) Agent Deal created an  
24 Operational Plan for the SRT to employ in executing the  
25 arrest warrants. (SRT Report at p. 1.)

26

27

28

1       On August 10, 2005, ten DHS Internal Affairs Agents,  
2 a United States Marshal, seventeen SRT members, eight  
3 unmarked cars and a Blackhawk helicopter arrived at the  
4 Davises' residence in Yucca Valley to execute warrants  
5 for the Davises' arrests.<sup>16</sup> (ICE Report at p. 4; SRT  
6 Report at pp. 2-3; Davis Decl., Ex. 55 ("Kot Decl.") ¶¶  
7 2-3, 9; Ex. 56 ("Kovalska Decl.") ¶¶ 2, 4; Ex. 57 ("Judd  
8 Decl."), Ex. 62.)

9

10       Agents first attempted to enter the house using a  
11 battering ram on a side door. (ICE Report at p. 4;  
12 SRT Report at p. 3.) They then entered through  
13 another door, which was voluntarily opened by Julia  
14 Davis's father, Mykola Kot. (SRT Report at p. 3.)  
15 They then handcuffed and detained Kot and Julia  
16 Davis's mother, Galyna Kovalska. (ICE Report at p.  
17 5; SRT Report at p. 3; Kot Decl. ¶ 4; Kovalska Decl.  
18 ¶¶ 5-7.) Kot, a sixty-one year old man who was  
19 wearing only underwear and socks, was kept outside in  
20 the sun for an hour while agents searched the house,  
21 although he asked for medication and to be allowed  
22 inside the house. (Kot Decl. ¶¶ 4, 6.) Kot's finger  
23 was broken in the raid, and Kovalska was bruised.  
24 (Davis Decl., Exs. 60.)

25

26

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27       <sup>16</sup> Although Julia Davis discussed this at length in  
28 her Declaration, Davis Decl. ¶¶ 68-75, there is no  
foundation for her statements, as she was not present at  
that time. The statements thus are inadmissible.

1       Neither Julia nor BJ Davis were present at the  
2 house at the time the warrants were executed. (ICE  
3 Report at p. 5; SRT Report at p. 3.) ICE Agents  
4 searched the house, and seized a Remington shotgun  
5 and seven rounds of ammunition from the master  
6 bedroom of the house, "[s]ince BJ Davis is not to  
7 possess firearms." (ICE Report at p. 5; see also  
8 Davis Decl., Ex. 66, ¶¶ 3-4; SRT Report at p. 3.)<sup>17</sup>  
9 The Agents also examined and took photographs of  
10 personal effects within the house, and noted evidence  
11 that suggested BJ Davis was living in the house and  
12 staying in the master bedroom. (ICE Report at p. 5;  
13 Kot Decl. ¶ 13; Kovalska Decl. ¶ 8.) The house was  
14 "cleared" in approximately four minutes (SRT Report  
15 at p. 3), but the search of the residence lasted  
16 approximately one hour. (Kot Decl. ¶ 6.)

17

18                   **3. Termination of the Federal Action**

19       BJ and Julia Davis surrendered to the United  
20 States Marshal on August 16, 2005. (ICE Report at p.  
21 6.) On March 3, 2006, the Government filed an ex  
22 parte application to dismiss all charges against Mr.  
23 and Mrs. Davis without prejudice, based on the  
24 Davises' allegations of misconduct by OPR Agents  
25 Deal, Kaufer, and Wong. (Case No. CR 05-757-AHM,

26 \_\_\_\_\_

27                   <sup>17</sup> Although there is conflicting evidence as to where  
28 exactly the shotgun was found, (Davis Decl. ¶ 78; Ex. 31  
at p. 5; Ex. 66, ¶ 4), this conflict is immaterial here.

1 Doc. No. 70; OIG Report at p. 3.) On March 7, 2006,  
 2 the Honorable A. Howard Matz granted the Government's  
 3 application. (Case No. CR 05-757-AHM, Doc. No. 74.)  
 4

5 **C. The State Criminal Charges**

6 In the course of his investigations of the  
 7 Davises' marriage, Agent Deal received information  
 8 that BJ Davis was arrested and sentenced for  
 9 involvement in a homicide<sup>18</sup> in 1973 in Shreveport,  
 10 Louisiana. (OIG Report at p. 2; Davis Decl., Ex. 78  
 11 ("Deal 2009 Dep.") 129:2-137:20; Wong Letter Ex. 2.)  
 12 According to this information, BJ Davis was granted a  
 13 pardon on October 11, 1995, which restored all civil  
 14 rights except the right to possess firearms. (OIG  
 15 Report at p. 2.)  
 16

17 On August 11, 2005, the day after the raid on the  
 18 Davises' house, Agent Kaufer requested a weapons  
 19 trace on the shotgun taken from the residence.  
 20 (Davis Decl., Ex. 70.) In that request, he stated  
 21 that the shotgun "was recovered from the residence of  
 22 a convicted felon (manslaughter)." (*Id.*) The  
 23

---

24       <sup>18</sup> In their submissions on this motion, Plaintiffs  
 25 accurately note that BJ Davis was convicted of  
 26 manslaughter, and not murder. See, e.g., Davis Decl. ¶  
 27 69; Wong Letter, Ex. 2. All records of the conviction  
 28 before the Court, which Agent Deal purportedly reviewed,  
 refer to the crime as a manslaughter. The OIG  
 Investigative report, however, as well as Deal in his  
 deposition, refer to the crime as a "murder."

1 Firearms Trace Summary, produced by the Department of  
2 Justice, Bureau of Alcohol, Tobacco, Firearms and  
3 Explosives National Tracing Center, showed that the  
4 shotgun had been purchased by Julia Davis on April 5,  
5 2005. (Davis Decl., Ex. 71.)  
6

7 On November 18, 2005, Agent Kaufer sent Assistant  
8 United States Attorney John Lee, who was prosecuting  
9 the federal immigration fraud case, a letter  
10 "strongly urg[ing]" Lee to charge BJ Davis with a  
11 violation of 18 U.S.C. § 922(g)(1), which bars the  
12 possession of firearms by convicted felons. (Davis  
13 Decl., Ex. 72.) No such charge was ever brought.  
14

15 On December 9, 2005, Agent Wong<sup>19</sup> mailed a letter  
16 to Rick Young, Supervisory Deputy District Attorney  
17 in the San Bernardino County District Attorney's  
18 Office, and Max Pfenning, Special Agent in the  
19 California Department of Justice Firearms Division.  
20 (Def.'s Ex. 1 ("Wong Letter").) The letter stated  
21 that, on August 9, 2005, agents found a loaded  
22 Remington shotgun at the Davises' residence in Yucca  
23 Valley, California. (Id. at p. 1.) It further  
24 stated this was a "probable violation" of the  
25 California Penal Code, based on BJ Davis's status as  
26

27 \_\_\_\_\_  
28 <sup>19</sup> Agent Deal wrote the initial draft of this letter.  
(Deal 2009 Dep. at 231:13-31.)

1 a convicted felon. (Id.) The letter mentioned that  
2 DHS believed Julia Davis was aware of this violation,  
3 based on documents filed in the earlier MSPB  
4 proceedings and a previous civil action. (Id. at p.  
5 2.)

6

7 The letter stated that BJ Davis had been  
8 convicted of manslaughter and accessory after the  
9 fact in Louisiana on June 21, 1974. (Wong Letter at  
10 pp. 1-2.) It noted that BJ Davis was pardoned for  
11 this crime on October 11, 1995, but with the  
12 condition that he not "own, possess, receive, ship,  
13 or transport firearms." (Id. at p. 2.) In the  
14 letter, Agent Wong also included several details as  
15 to the purchase of and ownership of the shotgun.  
16 (Id.) Agent Wong also stated there was "strong  
17 evidence" that BJ Davis had  
18 "rented/acquired/possessed" other weapons from a  
19 firearms dealer in Burbank, California, using funds  
20 from BHFS. (Id. at p. 3.)

21

22 Along with the letter, Agent Wong attached  
23 fifteen exhibits, including documents relating to the  
24 immigration fraud charges filed against the Davises  
25 and the Louisiana conviction and pardon, declarations  
26 from Julia Davis's parents relating to the August 10,  
27 2005 raid on the Davises' house, a motion from Julia  
28

1 Davis's MSPB proceedings, and materials relating to  
2 the settlement of the civil action between BJ Davis  
3 and BHFS. (Wong Letter, Exs. 1-15.) The letter  
4 referred the recipients to Agents Kaufer and Deal  
5 should they seek more information or assistance  
6 regarding the matter. (*Id.* at p. 3.) Agent Deal met  
7 with Rick Young in the San Bernardino County District  
8 Attorney's office in January 2006 and presented him  
9 with information about the case. (Deal 2009 Dep.  
10 236:16-22.)

11

12 On January 25, 2006, a felony complaint was filed  
13 in the California Superior Court, County of San  
14 Bernardino, charging both BJ and Julia Davis of  
15 violating California Penal Code § 12021(a)(1) by  
16 "own[ing], possess[ing], purchas[ing], receiv[ing],  
17 and hav[ing] custody and control" of a shotgun, after  
18 *both* were purportedly convicted of manslaughter on  
19 June 21, 1974 in Louisiana. (Davis Decl., Ex. 73.)

20

21 On November 2, 2006, the Superior Court granted  
22 both Davises' petitions to seal and destroy the  
23 records of this arrest and declare them factually  
24 innocent pursuant to Cal. Penal Code § 851.8. (Davis  
25 Decl., Ex. 74.)

26

27

28

## D. The OIG Report

On April 10, 2006, Julia Davis filed a complaint against Agent Wong with the Washington, D.C. office of ICE OPR in Washington regarding the events of August 10, 2005. (Davis Decl., Ex. 76 ("OIG Report"), Ex. 1 at pp. 6-24.) BJ Davis filed an independent complaint with the same office on October 8, 2006, accusing Agents Deal, Broyles, Kaufer, and Wong of improperly "divulgling formal complaints and protected disclosures made to the Federal Bureau of Investigation" in an unrelated matter. (OIG Report, Ex. 1 at p. 26.)

14 On June 13, 2007, the DHS OIG issued a Report of  
15 Investigation on Agents Wong, Kaufer, Deal, and Group  
16 Supervisor Robert Claborn and their involvement in  
17 the raid and search on the Davises' residence, which  
18 concluded "the use of the helicopter was appropriate  
19 and that no warrant-less search was conducted." (OIG  
20 Report at p. 1.)

### **III. DISPUTED FACTS**

23 The following disputed fact is material and  
24 relevant to Plaintiff's claims. There is conflicting  
25 evidence as to what, if any, items other than the  
26 shotgun were taken from the Davises' Yucca Valley  
27 house on the day it was searched. Agent Deal

1 maintains that no items were seized. (Davis Decl.,  
2 Ex. 66.) Witness Matthew Judd has stated that he saw  
3 agents leaving the house with "white papers and boxes  
4 with something sticking out of them" that they did  
5 not have "when they first ran in." (Judd Decl.)  
6 Julia Davis's parents, Mykola Kot and Galyna  
7 Kovalska, have stated that documents and their  
8 Ukrainian passports were taken from the house in the  
9 search. (Kot Decl. ¶¶ 12, 15; Kovalska Decl. ¶ 13,  
10 17.)

11

#### 12 **IV. LEGAL STANDARD**

13 A motion for summary judgment shall be granted  
14 when there is no genuine issue as to any material  
15 fact and the moving party is entitled to judgment as  
16 a matter of law. Fed. R. Civ. P. 56(c); Anderson v.  
17 Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).  
18 The moving party must show that "under the governing  
19 law, there can be but one reasonable conclusion as to  
20 the verdict." Anderson, 477 U.S. at 250.

21

22 Generally, the burden is on the moving party to  
23 demonstrate that it is entitled to summary judgment.  
24 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998);  
25 Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.,  
26 707 F.2d 1030, 1033 (9th Cir. 1983). The moving  
27 party bears the initial burden of identifying the  
28

1 elements of the claim or defense and evidence that it  
2 believes demonstrates the absence of an issue of  
3 material fact. Celotex Corp. v. Catrett, 477 U.S.  
4 317, 323 (1986).

5

6 Where the non-moving party has the burden at  
7 trial, however, the moving party need not produce  
8 evidence negating or disproving every essential  
9 element of the non-moving party's case. Celotex, 477  
10 U.S. at 325. Instead, the moving party's burden is  
11 met by pointing out that there is an absence of  
12 evidence supporting the non-moving party's case. Id.  
13 The burden then shifts to the non-moving party to  
14 show that there is a genuine issue of material fact  
15 that must be resolved at trial. Fed. R. Civ. P.  
16 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S.  
17 at 256. The non-moving party must make an  
18 affirmative showing on all matters placed in issue by  
19 the motion as to which it has the burden of proof at  
20 trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S.  
21 at 252. See also William W. Schwarzer, A. Wallace  
22 Tashima & James M. Wagstaffe, Federal Civil Procedure  
23 Before Trial § 14:144.

24

25 A genuine issue of material fact will exist "if  
26 the evidence is such that a reasonable jury could  
27 return a verdict for the non-moving party."

28

1     Anderson, 477 U.S. at 248. In ruling on a motion for  
2 summary judgment, the Court construes the evidence in  
3 the light most favorable to the non-moving party.  
4     Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir.  
5 1991); T.W. Electrical Serv. Inc. v. Pacific Elec.  
6 Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir.  
7 1987).

8

9

## V. DISCUSSION

10       The FTCA provides that the United States may be  
11 held liable for "personal injury or death caused by  
12 the negligent or wrongful act or omission of any  
13 employee of the Government while acting within the  
14 scope of his office or employment, under  
15 circumstances where the United States, if a private  
16 person, would be held liable to the claimant in  
17 accordance with the law of the place where the act or  
18 omission occurred." 28 U.S.C. § 1346(b)(1). The  
19 United States is to be held liable "in the same  
20 manner and to the same extent as a private individual  
21 under like circumstances." 28 U.S.C. § 2674. See  
22 also United States v. Olson, 546 U.S. 43 (2005).

23

24       The Court thus examines Plaintiffs' tort claims  
25 under California law, as the acts alleged occurred  
26 within California. Bressi v. Ford, 575 F.3d 891, 900  
27 n. 9 (9th Cir. 2009).

28

1       **A. Malicious Prosecution**

2           Plaintiffs' malicious prosecution claim is based  
3 on their allegations that federal agents caused them  
4 to be prosecuted, without probable cause, in the San  
5 Bernardino County Superior Court on charges of being  
6 convicted felons in unlawful possession of a firearm.  
7 (SAC ¶ 128.)

8

9           To prevail on a claim of malicious prosecution, a  
10 plaintiff "must establish that the prior underlying  
11 action (1) was commenced by or at the direction of  
12 the defendant, or the defendant continued to  
13 prosecute it after discovering it lacked probable  
14 cause, and it was pursued to a legal termination in  
15 plaintiff's favor; (2) was brought without probable  
16 cause; and (3) was initiated with malice." HMS  
17 Capital, Inc. v. Lawyers Title Co., 118 Cal. App. 4th  
18 204, 213 (2004). The Government argues that  
19 Plaintiffs can establish neither that the action "was  
20 commenced by or at the direction" of the United  
21 States or its employees, nor that the federal agents  
22 involved lacked probable cause.

23

24       **1. Commencement of the Action**

25           The Government argues that the San Bernardino  
26 County District Attorney made the "independent  
27 prosecutorial decision" to file the criminal charges

28

1 against Plaintiffs, and thus the federal  
2 "investigatory agents" cannot be held liable for this  
3 decision under a theory of malicious prosecution.  
4 (Def.'s Mem. at 8-9.)

The Government bases this argument on General Dynamics Corp. v. United States, 139 F.3d 1280 (9th Cir. 1998). There, the Ninth Circuit held that a plaintiff could not sustain a malicious prosecution claim against a federal investigative agency under the FTCA, based on a report the agency negligently prepared and provided to federal prosecutors, who brought an indictment against the plaintiff. Id. at 1283-86. The court's holding in General Dynamics, however, was based explicitly on an interpretation of a provision of the FTCA, 28 U.S.C. § 2680(a), which bars claims against the United States for the discretionary functions of its employees. The court found the plaintiff's claim was an improper attempt to "recharacterize" the prohibited claim against federal prosecutors for their discretionary action as a claim the investigators. 139 F.3d at 1286. Here, there is no such attempt to evade 28 U.S.C. § 2680(a), as the prosecutors who made the decision were state, not federal actors.<sup>20</sup>

<sup>20</sup> This Court also has rejected previously the Government's argument that the OPR Agents themselves were (continued...)

1       Additionally, the Supreme Court's intervening  
 2 decision in United States v. Olson, 546 U.S. 43, 46  
 3 (2005), calls General Dynamics into question inasmuch  
 4 as it relied on principles of California law relating  
 5 to the liability of state and local law enforcement  
 6 officers for charging decisions by prosecutors.

7 Under California law, law enforcement officers are  
 8 statutorily immune from liability for malicious  
 9 prosecution. Asqari v. City of Los Angeles, 15 Cal.  
 10 4th 744, 752 (1997), citing Cal. Gov't Code section  
 11 821.6. The Supreme Court's decision in Olson makes  
 12 this immunity irrelevant, though.

13

14       In Olson, the Ninth Circuit had held that where  
 15 an FTCA claim is based on "unique governmental  
 16 functions," the Government would be liable if "a  
 17 state or municipal entity would be subject to  
 18 liability under the law where the activity occurred."  
 19 546 U.S. at 45, quoting 362 F.3d 1236, 1240 (9th Cir.  
 20 2004). Reversing the Ninth Circuit's decision, the

21

---

22

<sup>20</sup>( ...continued)  
 23 acting in a discretionary function, and the Government  
 24 does not appear to be asking the Court to revisit that  
 determination. See September 4, 2009 Minute Order  
 Denying Motion to Dismiss (Doc. No. 179) at pp. 5-7.

25

26       In light of the Court's interpretation of General  
Dynamics and California law under Olson, the Court does  
 27 not address Plaintiffs' contention that their claims fall  
 under an exception to General Dynamics in that they  
 28 "arise from the government's failure to follow its own  
 required procedures." (Am. Opp'n at p. 23.)

1     Olson Court held that the FTCA requires courts to  
2     look to the state law liability of private persons,  
3     not to that of public employees or entities, when  
4     assessing the Government's liability under the FTCA,  
5     even when the tort claim is based upon the  
6     performance of "uniquely governmental" functions.  
7     546 U.S. at 46.

8  
9                 The appropriate inquiry thus is whether, under  
10 California law, the independent decision of a local  
11 prosecutor would bar a malicious prosecution action  
12 against a private person. This scenario has been  
13 examined in cases where private persons maliciously  
14 have lodged complaints with or given testimony to  
15 district attorneys or other prosecutorial officials.  
16 Under California law, such persons can be liable for  
17 malicious prosecution so long as they were "actively  
18 instrumental in causing the prosecution." Cedars-  
19 Sinai Medical Center v. Super. Ct., 206 Cal. App. 3d  
20 414, 417 (1988).<sup>21</sup> See also Lauter v. Anoufrieva, 642  
21 F. Supp. 2d 1060, 1093 (C.D. Cal. 2009) (private  
22 citizens who filed police report may be liable for  
23 malicious prosecution); Sims v. United States, No.

24 \_\_\_\_\_  
25                 <sup>21</sup> The Court acknowledges that California law differs  
26 from that of other states in this respect. Compare  
27 Bressi v. Ford, 575 F.3d 891, 899 (9th Cir. 2009) (in  
28 affirming dismissal of FTCA malicious prosecution claim,  
noting Arizona law bars a malicious prosecution claim  
where a criminal prosecutor has made an independent  
decision to prosecute).

1 2:07-cv-02082-MCE, 2008 WL 4813827, at \*4 (E.D. Cal.  
2 Oct. 29, 2008) (applying Cedars-Sinai in FTCA case);  
3 Ludwig v. Super. Ct., 37 Cal. App. 4th 8, 25 n. 26  
4 (1995) (restating "actively instrumental" test);  
5 Goehring v. Wright, 858 F. Supp. 989, 1000 (N.D. Cal.  
6 1994) (neighbors may be liable for malicious  
7 prosecution arising out of false complaints to  
8 police). Under such a theory, a plaintiff must show  
9 "that the defendant has at least sought out the  
10 police or prosecutorial authorities." Sullivan v.  
11 County of Los Angeles, 12 Cal. 3d 710, 720 (1974).

12

13       The letter from Agent Wong states: "We [ICE]  
14 present this matter to you for probable violations of  
15 the California [P]enal [C]ode." (Def.'s Ex. 1 at p.  
16 1.) The letter laid out detailed evidence against  
17 the Davises, and indicated an active desire to assist  
18 in any prosecution that might come about. Agent Deal  
19 then met with the prosecutor on the case. Based on  
20 this evidence, Plaintiffs have produced sufficient  
21 evidence to allow a fact finder to conclude that  
22 federal agents "sought out" prosecutors, and were  
23 "actively instrumental" in causing the state criminal  
24 prosecution. Summary judgment on this basis thus is  
25 inappropriate.

26

27

28

1           **2. Probable Cause**

2           The Government also argues that the undisputed  
3 evidence establishes that the federal agents had  
4 probable cause in instigating the state criminal  
5 prosecution, and hence Plaintiffs cannot prevail on  
6 their malicious prosecution claim.

7

8           Under California law, in the context of malicious  
9 prosecution, probable cause is defined as ". . . an  
10 honest suspicion or belief on the part of the  
11 instigator of the prosecution, founded upon facts  
12 sufficiently strong to warrant the average person in  
13 believing the charge to be true." Cummings v. Fire  
14 Ins. Exch., 202 Cal. App. 3d 1407, 1419 (1988). This  
15 standard is applied "based upon the state of a  
16 defendant's knowledge at the time a lawsuit is  
17 initiated and . . . the facts known to the  
18 defendant." Lauter, 642 F. Supp. 2d at 1093.

19

20           Plaintiffs were charged with violating California  
21 Penal Code § 12021(a)(1). The relevant elements of  
22 this crime are (1) the defendant is "[a] person who  
23 has been convicted of a felony under the laws of the  
24 United States, the State of California, or any other  
25 state, government, or country" and (2) the defendant  
26 "owns, purchases, receives, or has in his or her

27

28

1 possession or under his or her custody or control any  
2 firearm." Cal. Penal Code § 12021(a)(1).

3

4 Agents Wong and Deal had probable cause to  
5 believe BJ Davis had committed this crime at the time  
6 they composed and sent the letter. They had reliable  
7 information that BJ Davis had been convicted of a  
8 felony - manslaughter - in the State of Louisiana.  
9 (Wong Letter, Exs. 2, 7, 8.) They also had reliable  
10 information that a shotgun was found in the master  
11 bedroom of BJ Davis's house. (Wong Letter, Ex. 9.)  
12 These two facts were sufficient as a matter of law to  
13 create a "reasonable suspicion" that BJ Davis was  
14 guilty of violating Penal Code section 12021(a)(1).  
15

16 Plaintiffs have failed to identify any evidence  
17 that suggests a contrary conclusion. They point to  
18 the fact that the shotgun was registered to Julia  
19 Davis only, and that BJ Davis had a "listed address"  
20 other than the Yucca Valley house as evidence that BJ  
21 Davis could not have been in possession of the  
22 shotgun. (Am. Opp'n at 25.)  
23

24 While these facts are relevant to whether the  
25 State could prove BJ Davis's guilt beyond a  
26 reasonable doubt in a criminal prosecution, they do  
27 not defeat probable cause. The registration of a gun  
28

1 to one owner in no way precludes another from  
2 possessing it, as more than one person may possess  
3 the same weapon concurrently. See People v.  
4 Williams, 170 Cal. App. 4th 587, 625 (2009). The  
5 Agents had significant evidence that BJ Davis  
6 actually resided in the Yucca Valley house, including  
7 declarations of Julia Davis's parents referring to  
8 the house as the residence of their "daughter and BJ  
9 Davis" (Wong Letter, Ex. 4 ¶ 2; Ex. 5 ¶ 2) and BJ  
10 Davis's own use of the Yucca Valley address as his  
11 residence when he was booked on the federal criminal  
12 charges. (Wong Letter, Ex. 3.) Plaintiffs also cite  
13 to Julia Davis's Declaration statement that BJ did  
14 not know she had the gun there, (Am. Opp'n at 25,  
15 citing Davis Decl. ¶ 78), but this declaration,  
16 prepared for this motion, was not before the Agents  
17 at the time the letter was prepared and sent, and is  
18 thus irrelevant to the probable cause determination.  
19

20 There is a separate question as to whether the  
21 Agents had probable cause to believe that *Julia Davis*  
22 had violated section 12021(a)(1). Since there was no  
23 evidence that Julia Davis was a felon, Agents Wong  
24 and Deal lacked probable cause to suspect that she  
25 personally and independently violated section  
26 12021(a)(1). Under California law, however, a person  
27 may be guilty of a crime by aiding and abetting the  
28

1 commission of that crime. Cal. Penal Code § 31. A  
2 person aids and abets a crime when he or she (1)  
3 "act[s] with knowledge of the criminal purpose of the  
4 perpetrator" and (2) has the "intent or purpose  
5 either of committing, or of encouraging or  
6 facilitating commission of, the offense." People v.  
7 Beeman, 35 Cal. 3d 547, 560 (1984). One may aid and  
8 abet another's possession of a weapon. See In re  
9 Malcolm M. 147 Cal. App. 4th 157, 169-70 (2007).

10

11 At the time Agents Wong and Deal sent the letter,  
12 they possessed evidence that (1) Julia Davis  
13 purchased the gun; (2) Julia Davis had knowledge of  
14 her husband's felony conviction;<sup>22</sup> and (3) the gun was  
15 stored in their joint marital bedroom. (Wong Letter,  
16 Exs. 6-8.) Agent Deal has stated that his  
17 investigation led him to conclude that Julia Davis  
18 "had purchased the shotgun" as "a straw man  
19 purchase." (Deal 2009 Dep. 234:11-235:16.) This was  
20 sufficient to establish a reasonable suspicion that  
21 Julia Davis intentionally obtained the gun to  
22 encourage or facilitate her husband's possession of  
23

24

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<sup>22</sup> At the hearing on this motion, Plaintiffs' counsel suggested that this evidence did not show Julia Davis had knowledge of BJ Davis's conviction at the time she purchased the gun, but a review of the evidence suggests otherwise. Julia Davis filed copies of her husband's conviction and pardon record in the MSPB proceedings in October 25, 2004. (Def.'s Ex. 1, Ex. 7.) She purchased the gun in April 2005. (Def.'s Ex. 6.)

1 it, despite his felony conviction. Again, Julia  
2 Davis's statements in connection with this motion  
3 that BJ Davis had no knowledge of the gun's  
4 existence, while relevant to her ultimate guilt, do  
5 not defeat probable cause.

6

7 Since Agents Wong and Deal possessed probable  
8 cause to believe that BJ and Julia Davis both  
9 violated California Penal Code § 12021(a)(1) when  
10 they communicated with county prosecutors, the  
11 Government's motion for partial summary judgment as  
12 to Plaintiffs' malicious prosecution claim is  
13 GRANTED.

14

15 **B. Abuse of Process**

16 Plaintiffs' abuse of process claim is premised on  
17 several distinct acts by federal agents. They  
18 contend the following actions constituted abuses of  
19 process:

20 (1) The October 9, 2004 search of the Beverly  
21 Hills Film Studios and seizure of Plaintiffs'  
property from that location;

22 (2) The August 9, 2005 instigation of federal  
immigration fraud charges against Plaintiffs  
based on false information;

23 (3) The August 10, 2005 search of Plaintiffs'  
residence and seizure of Plaintiffs' property  
from that location;

24 (4) The failure to provide Plaintiffs with  
exculpatory evidence obtained from the Screen  
Actors Guild in the course of the federal  
criminal action; and

25

1                 (5) "Urging" the San Bernardino District Attorney  
 2 to file charges against Plaintiffs for unlawful  
 3 possession of a firearm.

4  
 5                 (SAC ¶¶ 133-37.)<sup>23</sup>

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"To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." Rusheen v. Cohen, 37 Cal. 4th 1048, 1056 (2006). The Government contends that Plaintiffs cannot establish any of the five actions described above constituted such an abuse of process for four different reasons: (1) abuse of process is not available to attack the initiation of a criminal proceeding; (2) the OPR Agents' communications to law enforcement are absolutely protected by statutory privilege; (3) prior rulings of this Court bar any

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<sup>23</sup> In their Amended Opposition, Plaintiffs argue that federal agents also abused process by (1) "revealing to dangerous suspects of an FBI investigation that Plaintiffs were informants"; (2) "conducting warrantless and unauthorized land and aerial surveillance"; and (3) "attempting to use these trumped up [immigration fraud] charges to nullify the EEOC ruling[.]" (Am. Opp'n at 22.) Such allegations are not contained in the operative Second Amended Complaint, and thus cannot be considered by the Court. "[A] plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." Centex Homes v. Fin. Pac. Ins. Co., No. CV F 07-00567 AWI, 2009 WL 5030138, at \*5 (E.D. Cal. Dec. 16, 2009), quoting Speer v. Rand McNally & Co., 123 F.3d 658, 665 (7th Cir. 1997). See also Pickern v. Pier 1 Imp. (U.S.), Inc., 457 F.3d 963, 968-69 (9th Cir. 2006).

1 claims relating to a failure to produce exculpatory  
2 evidence; and (4) their claims related to searches  
3 and seizure of property fail to state a claim.

4

5       **1. Abuse of Process and the "Initiation" of  
Criminal Proceedings**

6           The Government argues that "abuse of process is  
7 not an appropriate cause of action to attack the  
8 initiation of a criminal proceeding," as the tort is  
9 "founded upon subsidiary activity within the  
10 lawsuit." (Def.'s Mem. at p. 12, quoting Adams v.  
11 Super. Ct., 2 Cal. App. 4th 521, 528 (1992).) This  
12 is a correct statement of the law. The California  
13 Supreme Court has held, "while a defendant's act of  
14 improperly instituting or maintaining an action may,  
15 in an appropriate case, give rise to a cause of  
16 action for malicious prosecution, the mere filing or  
17 maintenance of a lawsuit - even for an improper  
18 purpose - is not a proper basis for an abuse of  
19 process action." Oren Royal Oaks Venture v.  
20 Greenberg, Bernhard, Weiss & Karma, Inc., 42 Cal. 3d  
21 1157, 1169 (1986). See also Lunsford v. Am.  
22 Guarantee & Liab. Ins. Co., 18 F.3d 653, 655 (9th  
23 Cir. 1994); Contemporary Servs. Corp. v. Staff Pro  
24 Inc., 152 Cal. App. 4th 1043, 1059 (2007). Although  
25 the Government is correct as to this legal principle,  
26 its application to this case is not as wide-reaching  
27 as the Government suggests.

28

1       The Government contends that this principle bars  
2 Plaintiffs' abuse of process claim insofar as it is  
3 based on the "instigation" of the filing of the  
4 federal criminal charges; the withholding of  
5 exculpatory evidence in the federal criminal  
6 proceedings; and the "urging" of state prosecutors to  
7 bring the weapons possession charges.

8

9       The Court agrees that Plaintiffs cannot state a  
10 claim for abuse of process based on either the  
11 instigation of the federal criminal charges or the  
12 OPR Agents' role in the filing of state criminal  
13 charges under the case law noted above. The sole  
14 action for recovery in tort for the bringing of  
15 meritless charges is malicious prosecution. See  
16 Bidna v. Rosen, 19 Cal. App. 4th 27, 40 (1993). The  
17 Government is thus entitled to summary judgment as to  
18 the abuse of process claims based on these two  
19 events.<sup>24</sup>

20

21       This principle has no bearing, though, on an  
22 abuse of process claim based on the withholding or  
23 concealment of exculpatory evidence. Such a claim  
24 directly targets "subsidiary activity within the

25  
26 \_\_\_\_\_  
27       <sup>24</sup> The Court thus need not address the Government's  
28 argument that these actions are protected by the absolute  
privilege for certain communications to law enforcement  
agencies provided by Cal. Civil Code § 47.

1 lawsuit," and has been held viable as a matter of law  
2 by at least one other California district court. See  
3 Garcia v. City of Merced, 637 F. Supp. 2d 731, 751  
4 (E.D. Cal. 2008). Nonetheless, Plaintiffs have  
5 failed to address this claim in their Opposition or  
6 provide any evidence whatsoever concerning the  
7 alleged withholding of exculpatory evidence, and it  
8 appears this claim has been abandoned. The  
9 Government is thus entitled to summary judgment on  
10 the abuse of process claim as to this event as well.

11

12 **2. Abuse of Process and Search and Seizure**

13 The only remaining claimed abuses of process are  
14 the October 2004 search of and seizure of property  
15 from BHFS, and the August 2005 search of and seizure  
16 of property from the Davises' Yucca Valley house.  
17 The Government contends that Plaintiffs have failed  
18 to state a claim regarding either of these searches.

19

20 The Government first contends that the stipulated  
21 dismissal of Plaintiffs' conversion claim as to both  
22 searches (Doc. No. 127) and the stipulated dismissal  
23 of Plaintiffs' trespass claim as to the October 2004  
24 search (Doc. No. 242) somehow bar these abuse of  
25 process claims. (Def.'s Mem. at p. 14.) But neither  
26 of the dismissals, which were without prejudice, have  
27 any impact on the merits of the remaining claims. "A  
28

1 plaintiff who sets forth alternative remedies in  
2 separate counts in his complaint may abandon or  
3 dismiss one count without prejudice to his right to  
4 proceed on the other." Amadeo v. Principal Mut. Life  
5 Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002). See  
6 also Wilson-Cook Med., Inc. v. Wilson, 942 F.2d 247,  
7 251 (4th Cir. 1991) (the effect of an order granting  
8 voluntary dismissal is merely "to tailor the  
9 complaint to its final form").

10  
11       The Government next argues that "the taking of  
12 property, regardless of its lawfulness, is not an  
13 abuse of process." (Def.'s Mem. at p. 14.) The  
14 Government provides no citation for this proposition,  
15 nor has the Court located any supporting authority.  
16 To the contrary, relevant California legal authority  
17 suggests that the wrongful taking of property  
18 pursuant to a judicial order can constitute an abuse  
19 of process. See Microsoft Corp. v. A-Tech Corp., 855  
20 F. Supp. 308, 311-12 (C.D. Cal. 1994) (improper  
21 freezing of assets can serve as basis for abuse of  
22 process claim); Bidna, 19 Cal. App. 4th at 40 (noting  
23 abuse of process claims can arise from improper or  
24 excessive attachment of property); 6A Cal. Jur. 3d  
25 Assault and Other Wilful Torts § 17 ("An abuse of  
26 process may occur where process is used for the  
27  
28

1 unauthorized purpose of acquiring property for one's  
2 own use.").

3

4 Moreover, Plaintiffs have alleged that the  
5 searches themselves, and not just the resulting  
6 property seizures, were abuses of process. (SAC ¶¶  
7 133, 135.) While the Government has stated that the  
8 execution of search or arrest warrants lies "outside  
9 the auspices of the judicial system," it cites no  
10 authority for this proposition. (Am. Reply at p. 8.)  
11 A warrant is by its very nature an exercise of  
12 judicial power, and is only issued based upon one or  
13 more judicial determinations. See, e.g., Florida  
14 Dep't of State v. Treasure Salvors, Inc., 458 U.S.  
15 670, 705 (1982) (warrant for arrest invokes judicial  
16 power); Platz v. Marion, 35 Cal. App. 2d 241, 245 (1917)  
17 (employing "the authority to issue a warrant of  
18 arrest . . . necessarily exercises the judicial  
19 powers").

20

21 Many courts, both in California and in other  
22 jurisdictions, have recognized that an abuse of  
23 process claim may lie where an arrest or search  
24 warrant was improperly obtained. See Garcia, 637 F.  
25 Supp. 2d at 751 (citing Gonzalez v. Immigration &  
26 Naturalization Serv., 405 F.3d 45, 50 (1st Cir.  
27 2005)). See also U.S. Steel, LLC v. Tieco, Inc., 261  
28

1 F.3d 1275, 1291-92 (11th Cir. 2001) (applying Alabama  
2 law); VanZandt v. Fish & Wildlife Serv., 524 F.  
3 Supp. 2d 239, 246-47 (W.D.N.Y. 2007) (applying New  
4 York law). While claims alleging that the *execution*  
5 of the warrant was an abuse of process are less  
6 common, several courts in other states have suggested  
7 the execution of a warrant can constitute an abuse of  
8 process. See, e.g., Gibson v. Regions Fin. Corp.,  
9 557 F.3d 842, 845 (8th Cir. 2009) (applying Arkansas  
10 law); Washington v. Drug Enforcement Admin., 183  
11 F.3d 868, 875 (8th Cir. 1999) (applying Missouri  
12 law); Eliason Corp. v. Bureau of Safety & Regulation  
13 of Mich. Dep't of Labor, 564 F. Supp. 1298, 1307  
14 (W.D. Mich. 1983) (applying Michigan law). Under  
15 California law, as in these other states, "[t]he  
16 essence of the tort 'abuse of process' lies in the  
17 misuse of the power of the court; it is an act done  
18 in the name of the court and under its authority for  
19 the purpose of perpetrating an injustice." Estate of  
20 Tucker ex rel. Tucker v. Interscope Records, Inc.,  
21 515 F.3d 1019, 1037 (9th Cir. 2008), quoting Stolz v.  
22 Wong Communications Ltd. P'ship, 25 Cal. App. 4th  
23 1811, 1822 (1994). The Court therefore concludes  
24 that the misuse of a judicially-sanctioned warrant to  
25 search or take property for improper motives, as  
26 alleged here, may constitute an abuse of process.

27

28

1       The Court thus proceeds to examine the evidence  
2 presented as to each of the two searches in order to  
3 determine if Plaintiffs have sufficiently stated an  
4 abuse of process claim.

5

6           **a) The October 2004 Search**

7       There is insufficient evidence on the record to  
8 support Plaintiffs' claim for abuse of process based  
9 on the October 2004 search of and seizure of property  
10 from BHFS.

11

12       In their Amended Opposition, Plaintiffs do not  
13 discuss this incident at all. Julia Davis addresses  
14 the seizure of documents from BHFS in vague terms in  
15 her Declaration (Davis Decl. ¶ 54), stating:

16       The agents also took advantage of this  
17 investigation to improperly seize personal  
18 documents and materials belonging to both BJ  
19 and I without a warrant and without any  
20 consent from either one of us. The seized  
21 documents included files on my EEOC case  
22 against the government, banking and files  
23 collected on the investigations launched  
24 against BJ Davis and I by Agents Deal,  
25 Kaufer, and Broyles.

21       (Davis Decl. ¶ 54.) Julia Davis does not indicate  
22 she was present at the scene of the search, nor that  
23 she personally observed the seizure of any documents  
24 or materials. Therefore the statement lacks  
25 foundation, and is inadmissible.

26

27

28

1       The only evidence cited as support for Julia  
2 Davis's statement is an excerpt from a brief filed by  
3 the Government in the federal criminal case, which  
4 states that "Documents obtained from the Beverly  
5 Hills Film Studio were not seized, as alleged by  
6 defendants, but provided voluntarily by the studio."  
7 (Davis Decl. ¶¶ 54, 135, Ex. 50 at p. 9.)  
8 "Statements in briefs are not evidence of the facts  
9 asserted." In re Heritage Bond Litig., No. CV  
10 02-1475-DT(RCx), 2004 WL 1970058, at \*4, n. 4 (C.D.  
11 Cal. July 23, 2004), quoting Bell v. United Princeton  
12 Props., Inc., 884 F.2d 713, 720 (3d Cir. 1989). See  
13 also Carrillo-Gonzalez v. Immigration &  
14 Naturalization Serv., 353 F.3d 1077, 1079 (9th Cir.  
15 2003) (argument by counsel is not evidence). While  
16 in some circumstances, representations in briefs may  
17 be considered admissions, see Marceau v. Int'l Bhd.  
18 of Elec. Workers, 618 F. Supp. 2d 1127, 1170 n. 13  
19 (D. Ariz. 2009) (citing United States v. One Heckler-  
20 Koch Rifle, 629 F.2d 1250, 1253 (7th Cir. 1980)), the  
21 cited material could only be an admission that some  
22 documents were received from BHFS at some point in  
23 time. This does not provide any details as to what  
24 documents were obtained, or the circumstances under  
25 which they were obtained. Accordingly, Plaintiffs  
26 have failed to produce sufficient evidence to support  
27  
28

1 an abuse of process claim based on any search of, or  
2 seizure of property from, BHFS.

3

4           **b) The August 2005 Search**

5           Plaintiffs have produced significant evidence  
6 about the August 2005 raid and search of their  
7 residence, as noted above. This evidence is  
8 sufficient to create a factual question as to whether  
9 federal agents committed an abuse of process when  
10 they conducted that search pursuant to the arrest  
11 warrant.

12

13           The use of the arrest warrant to launch the raid  
14 and search on Plaintiffs' house, and to seize  
15 property therein, will be an abuse of process if the  
16 involved agents "(1) contemplated an ulterior motive  
17 in using the process, and (2) committed a willful act  
18 in the use of the process not proper in the regular  
19 conduct of the proceedings." Rusheen, 37 Cal. 4th at  
20 1056. "The ulterior motive element can be inferred  
21 from proof of a willful improper act." Flores v.  
22 Emerich & Fike, No. 1:05-CV-0291 AWI, 2008 WL  
23 2489900, at \*13 (E.D. Cal. June 18, 2008); see also  
24 Charles J. Vacanti, M.D., Inc. v. State Comp. Ins.  
25 Fund, 24 Cal. 4th 800, 824 (2001).

26

27

28

1       The events of August 10, 2005 were carried out in  
2 accordance with an operational plan drafted by Agent  
3 Deal, utilizing the resources of the SRT, which were  
4 obtained by Agent Deal. There is thus no dispute  
5 that the events of that day were the "willful" acts  
6 of federal employees. A more difficult question,  
7 though, is whether the search was "not proper in the  
8 regular conduct of the proceedings." In light of the  
9 substantial evidence presented by Plaintiffs as to  
10 the magnitude of the search, and the Government's  
11 failure to identify undisputed facts in support of a  
12 contrary finding, the Court holds that a reasonable  
13 fact finder could find the extreme nature of the  
14 search and raid of the Davises' Yucca Valley home was  
15 "not proper in the regular conduct of the  
16 proceedings."

17

18       Throughout their opposition, Plaintiffs have  
19 identified evidence that suggests the degree of force  
20 used in the search was severe, particularly in light  
21 of the nonviolent nature of the charges against the  
22 Davises. An Expert Witness, Retired CBP Supervisor  
23 Leonard Rios, stated that, in his expert opinion,  
24 without Agent Deal's specific (false) claim to the  
25 SRT that BJ Davis had previously been convicted of  
26 "first degree murder," the SRT would not have been  
27 involved in the arrest at all. (Davis Decl., Ex. 77  
28

1 at p. 33.)<sup>25</sup> Agent Deal has admitted that he had  
2 reviewed the records of BJ Davis's conviction at the  
3 time he met with the SRT, (Deal 2009 Dep. at 129:14-  
4 134:6), and those records showed that BJ Davis had  
5 been convicted of and pardoned of the lesser charge  
6 of manslaughter.

7

8       The reports of the Agents involved suggest no  
9 attempt to arrest the Davises in a more peaceable  
10 manner was ever even considered. According to Julia  
11 Davis's parents, in the course of the search, Agent  
12 Deal told them that Mrs. Davis was a "domestic  
13 terrorist," a statement without any support. (Kot  
14 Decl. ¶ 10; Kovalska Decl. ¶ 11.) At some point on  
15 the day of the raid, someone scrawled the word  
16 "Boo!" and crossed out the date on Julia Davis's  
17 calendar, located in her home. (Davis Decl., Ex.  
18 61.) As discussed above, several witnesses have  
19 testified that documents and other items were seized  
20 from the home, though no receipt was given. The  
21 search of the home continued long after it was  
22 determined the persons named in the arrest warrant  
23 were not present. Together, this evidence creates a

24

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25       At the hearing on the Motion, counsel for the  
26 Government stated he intends to challenge Rios's  
27 qualifications as an expert witness should this case  
28 proceed to trial. However, the Government made no  
objection to the consideration of Rios's declaration in  
connection with this Motion, despite the opportunity to  
do so in its Reply.

1 question of material fact as to whether the manner in  
2 which the arrest warrants were executed was proper.

3

4 There is also sufficient evidence for a  
5 reasonable fact finder to conclude the OPR Agents had  
6 an ulterior, improper motive: retaliation for Julia  
7 Davis's successful EEOC complaint. "[A]n arrest  
8 warrant is not to be used for unlawful retaliation."  
9 Garcia, 637 F. Supp. 2d at 751. In addition to the  
10 unusual degree of force used in executing the  
11 arrests, the arrest warrants were executed two months  
12 after the EEOC ALJ issued his initial decision in  
13 Julia Davis's sexual harassment case, which was in  
14 her favor and highly critical of CBP, ICE, and their  
15 internal investigators. (EEOC Op.) Agents Deal,  
16 Kaufer, and Wong had all been involved in Julia  
17 Davis's EEOC and MSPB proceedings. See, e.g., Davis  
18 Decl., Ex. 9 (January 10, 2005 Dep. of Jeffrey Deal);  
19 Ex. 18 (January 10, 2005 Dep. of James Wong); Ex. 33  
20 (January 10, 2005 Dep. of Herbert Kaufer.) One week  
21 after the search, CBP moved to hold the ALJ's  
22 decision in abeyance based on the federal criminal  
23 charges. (Davis Decl., Ex. 2.) The sum total of  
24 these facts is sufficient to allow a fact finder to  
25 infer a retaliatory or malicious motive in the  
26 execution of the search. Cf. George v. Cal.  
27 Unemployment Ins. Appeals Bd., 179 Cal. App. 4th 1475  
28

1 (2009) (finding sufficient evidence to support an  
 2 inference of retaliatory motive for FEHA claim);  
 3 McRae v. Dep't of Corrs. & Rehab., 142 Cal. App. 4th  
 4 377, 388 (2006) (knowledge of protected activity and  
 5 proximity in time between protected action and  
 6 alleged retaliatory act sufficient to establish prima  
 7 facie case under FEHA). Plaintiffs have therefore  
 8 produced sufficient evidence to allow a reasonable  
 9 fact finder to conclude the August 2005 search was an  
 10 abuse of process.<sup>26</sup>

11

12 The Court thus GRANTS the Government's motion for  
 13 partial summary judgment as to the abuse of process  
 14 claim as to all alleged abuses except the August 2005

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15

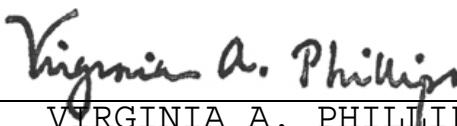
16       <sup>26</sup> At the hearing on this Motion, Plaintiffs' counsel  
 17 suggested that a question of fact as to whether the  
 18 August 2005 search constituted an abuse of process  
 19 potentially limited the Government's ability to use the  
 20 shotgun seized in that search to support defendant's  
 21 showing of probable cause on the malicious prosecution  
 22 claim. Even if the shotgun was the fruit of an unlawful  
 23 seizure, though, in a civil proceeding like this one,  
 24 there is no exclusionary rule which would bar the  
 25 Government from introducing it as evidence in a malicious  
 26 prosecution lawsuit to establish probable cause. See  
Ecker v. Raging Waters Group, Inc., 87 Cal. App. 4th  
 1320, 1329 (2001). See also Pennsylvania Bd. of  
 Probation & Parole v. Scott, 524 U.S. 357, 363 (1998)  
 23 (noting exclusionary rule generally applies only to  
 24 criminal trials); Townes v. City of New York, 176 F.3d  
 138, 146 (2d Cir. 1999) (declining to extend the fruit of  
 25 the poisonous tree doctrine to section 1983 action);  
Cyrus v. City of New York, No. 06 CV 4685(ARR), 2010 WL  
 148078, at \*4 (E.D.N.Y. Jan. 14, 2010) ("the exclusionary  
 26 rule does not apply to the probable cause determination  
 27 in malicious prosecution claims"); McDaniel v. City of  
 Seattle, 65 Wash. App. 360, 364-67 (1992) (evidence  
 suppressed in criminal proceeding admissible for showing  
 28 probable cause in malicious prosecution civil suit).

1 search of and seizure of property from the Davises'  
2 home, and DENIES the motion as to the August 2005  
3 search.

4 **VI. CONCLUSION**

5 In accordance with the foregoing, the  
6 Government's Motion for Partial Summary Judgment is  
7 GRANTED as to Plaintiffs' malicious prosecution claim  
8 in its entirety, and GRANTED in part and DENIED in  
9 part as to Plaintiffs' abuse of process claim.

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11 Dated: January 28, 2010



12 VIRGINIA A. PHILLIPS  
13 United States District Judge

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